

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

RAY MESSMER,

Plaintiff,

v.

JOSEPH LEHMAN,

Defendant.

Case No. C04-5771RBL

REPORT AND  
RECOMMENDATION

**NOTED FOR  
August 5<sup>th</sup>, 2005**

This 42 U.S.C. § 1983 Civil Rights action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrates' Rules MJR 1, MJR 3, and MJR 4. Before the court is defendant's motion to dismiss. (Dkt. # 11). Plaintiff has not responded. Local Rule 7 (b)(2) in part states:

If a party fails to file papers in opposition to a motion, such failure may be considered by the court as an admission that the motion has merit.

FACTS

Plaintiff was an inmate serving a sentence with the state department of corrections. When plaintiff was released from the department of corrections he was detained for civil commitment as a sexually violent predator by the department of social health services. Plaintiff did not state in the complaint when his alleged earned early release date was, but he does indicate he was released by the department of corrections on

1 February 13<sup>th</sup>, 1997. (Dkt. # 9). This action was not filed until November 10<sup>th</sup>, 2004. (Dkt. # 1). Defendant  
2 Lehman moves to dismiss the action based on a running of the statute of limitations. (Dkt. # 11).

### 3 DISCUSSION

4 A court may dismiss a claim under Fed.R.Civ.P. 12(b)(6) if it appears beyond doubt that the  
5 plaintiff can prove no set of facts to support the claim that would entitle the plaintiff to relief. Keniston v.  
6 Roberts, 717 F.2d 1295, 1300 (9th Cir. 1983), citing; Conley v. Gibson, 355 U.S. 41, 45-56 (1957).  
7 Dismissal for failure to state a claim may be based on either the lack of a cognizable legal theory or the  
8 absence of sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Department,  
9 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the complaint is  
10 construed in the plaintiff's favor. Keniston v. Roberts, 717 F.2d 1295 (9th Cir. 1983).

#### 11 A. Statute of limitations.

12 The Civil Rights Act, 42 U.S.C. § 1983, contains no statute of limitations and the federal courts use the  
13 applicable statute of limitations from the state in which they sit. In Washington the statute of limitations for  
14 filing a civil rights action is three years. Rose v. Rinaldi, 654 F.2d 546 (1981).

15 Plaintiff alleges he was not released on his earned early release date and was held until February 13<sup>th</sup>,  
16 1997. (Dkt. # 9). While plaintiff was being held he could not have filed a civil rights action as he would have  
17 been challenging the fact or duration of his confinement and his remedy would have been to file a habeas  
18 petition. Heck v. Humphrey, 512 U.S. 477 (1994). Once he was released from the custody of the department  
19 of corrections plaintiff no longer had standing to file a habeas petition challenging his criminal sentence as he  
20 was not in custody on that conviction. Under 28 U.S.C. § 2254, the district court may entertain an  
21 application for a writ of habeas corpus only from a person in custody pursuant to the judgment of a state  
22 court. The custody requirement of the habeas corpus statute is designed to preserve the writ as a remedy  
23 for severe restraints on individual liberty. Hensley v. Municipal Court, San Jose Milpitas Judicial District,  
24 411 U.S. 345, 351 (1973). The person must be in custody pursuant to the conviction or sentence under  
25 attack at the time the petition is filed. Maleng v. Cook, 490 U.S. 488, 490-91 (1989); Carafas v. LaVallee,  
26 391 U.S. 234, 238 (1968).

27 When habeas was no longer available on February 13<sup>th</sup>, 1997 the three year statute began to run and  
28 plaintiff had until February 13<sup>th</sup>, 2000 to file his action. This action was filed four years and nine months after

1 the running of the statute of limitations. Defendant Lehman is entitled to dismissal.

2 CONCLUSION

3 This action is time barred. The defendant's motion to dismiss should be **GRANTED**. A proposed  
4 order accompanies this Report and Recommendation.

5 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil Procedure, the  
6 parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed. R. Civ.  
7 P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v.  
8 Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to  
9 set the matter for consideration on **August 5<sup>th</sup>, 2005**, as noted in the caption.

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11  
12 DATED this 11<sup>th</sup> day of July, 2005.

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16 /s/ J. Kelley Arnold  
17 J. Kelley Arnold  
18 United States Magistrate Judge  
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